

Michigan Supreme Court

State Court Administrative Office

Interim Report on Investigative Follow-up Review

to the

Michigan Office of the Auditor General

Performance Audit of Selected Probate Court Conservatorship Cases

Issued October 2003

In its “Performance Audit of Selected Probate Court Conservatorship Cases,” the Office of the Auditor General (OAG) criticizes the performance of several probate courts. The report suggests that those probate courts were doing a poor job overseeing conservatorship cases. To a large extent, the OAG report demonstrates that under the newly-enacted Estates and Protected Individuals Code (EPIC), conservators have a great deal of freedom to manage court wards’ estates, and court oversight is limited. The State Court Administrative Office’s (SCAO) examination of the cases selected for review by OAG indicates that the courts, with the exception of Washtenaw County Probate Court, complied with the statute’s requirements for monitoring conservatorship cases. The broader scope of the OAG audit revealed issues with some cases that would not be disclosed in the limited review imposed on the courts by EPIC. The OAG audit also included examination of conservators’ files. SCAO has reviewed all the court files audited by OAG and is taking appropriate corrective action where necessary. In addition, SCAO is reviewing conservatorship cases in probate courts throughout the state to monitor their compliance with the law. But, to prevent the kinds of shortcomings reported by the OAG audit, the pre-EPIC and pre-Revised Probate Code (RPC) level of court supervision would have to be restored and sufficient resources would have to be provided to the courts to comply with such a mandate.

The RPC initiated, and EPIC continued, a statutory plan under which the interested parties – not the court – are responsible for raising accounting issues and notifying the court of suspected wrongdoing by conservators. The trend in Michigan, as in many other states, has been to preserve estate assets by limiting costly court supervision of conservatorships. Under a 1939 law, probate courts were charged with examining estate transactions. The resulting delays and costs led many to try to operate outside the probate system. This statute was replaced in 1978 by the RPC, which introduced the concept of independent probate administration as a less-expensive, less time-consuming alternative to court-supervised administration. Independent administration, which involved almost no court oversight, became very popular with the public. In 1998, RPC was in turn replaced by EPIC, which became effective on April 1, 2000.

Sections 700.1101 - 700.1512 and Sections 700.5401 - 700.5433 of the Michigan Compiled Laws, and subchapters 5.100 – 5.900 of the Michigan Court Rules, regulate conservatorships in Michigan. These statutes and rules regulate such matters as:

- Fiduciary observance of a standard of care and discharge of all the duties and obligations of a confidential and fiduciary relationship, including loyalty, impartiality, care and prudence in action, and segregation of assets held in the fiduciary capacity.
- Fiduciary conformance to the Michigan prudent investor rule.
- Fiduciary limitations on engaging in transactions with the estate.
- Conservator responsibilities for preparing and filing estate inventories and accountings.
- Conservator accounting requirements for trusts and physical checks of estates as specified by the court.
- Conservator requirements to maintain suitable records and provisions for exhibiting those records.
- Conservator limitations on selling or otherwise disposing of property.
- Conservator requirements and limitations on expending or distributing estate money.

Auditor General's Report

In October 2003, OAG issued its report on the Performance Audit of Selected Probate Court Conservatorship Cases. The performance audit had the following objectives:

1. To determine the accuracy and validity of assertions contained in conservators' annual accountings filed with probate courts.
2. To assess the effectiveness and efficiency of probate courts' procedures and controls for administering and monitoring conservatorship cases.

The audit scope included examination of program and other records of five county probate courts (Calhoun, Huron, Jackson, Washtenaw, and Wayne) and the records of the appointed conservators for conservatorship cases filed with probate courts. The audit procedures included examination of probate courts' and conservators' files and activities primarily for the period October 1, 1998 through December 31, 2001.

With respect to each objective, the audit concluded that:

1. The assertions contained in conservators' annual accountings filed with probate courts were generally not accurate or valid.
2. Probate courts' procedures and controls for administering and monitoring conservatorship cases were generally not effective.

The audit report contained 10 findings and 11 corresponding recommendations. In its preliminary response, SCAO committed to reviewing each file covered by the report. SCAO also committed to taking any appropriate corrective action, including referral to the proper authorities for criminal prosecution and reporting attorney conservators to the Attorney Grievance Commission.

SCAO Investigative Follow-up Review

The purpose of the SCAO investigative follow-up review is to evaluate whether probate courts have violated provisions of the Michigan Compiled Laws and the Michigan Court Rules. SCAO's investigative follow-up review included a review of each conservatorship case examined in the performance audit. The investigative follow-up review examined the records and files of the individual probate courts, whereas the OAG performance audit also examined the records and files of the individual conservators who report to the courts.

Interim Findings of Investigative Follow-up Review

Conservators

Although the SCAO investigative follow-up review is still in progress, it has not found, to this point, a widespread misappropriation of funds. Based on the results of its review, SCAO has concluded that, in many instances, conservators were not trying to misappropriate funds or abuse the system, but simply did not realize what was required of them. The vast majority of conservators are laypeople, usually court wards' family members, who have no prior experience with estates. Notwithstanding this fact, SCAO has identified certain cases revealing evidence of improprieties where further examination by SCAO and the court is warranted.

Probate Courts

SCAO's investigative follow-up review found that most probate courts have complied with the Michigan Compiled Laws and the Michigan Court Rules in discharging their duties related to the administration of conservatorship cases. In fact, none of the files where OAG found deficiencies are from Jackson County.

There has been a change of leadership in the Washtenaw County Probate Court. The Chief Judge of the Trial Court, Judge Archie C. Brown, is now the Chief Judge of Probate Court. He has assigned Judge Donald E. Shelton as Chief Judge Pro Tem of the Probate Court. Judge Shelton is directly overseeing the reorganization of the Washtenaw County Probate Court. It is expected that this reorganization will be completed in nine to 12 months. Not only is the court following up on the cases that were the subject of the OAG audit, but it has reviewed all conservatorship files and is taking corrective action on all cases in that court.

***General and Specific Case File Comments Regarding the Findings of the
Performance Audit***

The following SCAO general and specific case file comments relate to the findings contained in the Performance Audit of Selected Probate Court Conservatorship Cases conducted by OAG. The general comments interpret and clarify probate court and conservator requirements, responsibilities, and expectations as they relate to the Michigan Compiled Laws and Michigan Court Rules. Specific case file comments address the individual cases as of the time SCAO conducted its investigative follow-up review, which was based on the records, files, and comments of probate court judges and staff. For many of the cases, it is unknown what impact the records, files, and testimony of conservators may have had on the specific case file comments had these factors been considered in the investigative follow-up review.

FINDING

1. Annual Accounting Reviews

Audit Condition:

“Probate courts did not establish and implement processes to adequately review annual accountings for appropriateness and reasonableness. The SCAO needs to provide direction and guidance to probate courts to adequately review annual accountings for appropriateness and reasonableness.”

General Comment:

Probate courts are required to conduct adequate reviews of annual accountings. Under Michigan law, a probate court is not required to conduct an audit before allowing an account. Pursuant to MCR 5.310, which was adopted to implement EPIC, interested parties receive a copy of the accounting with a notice that “(c) . . . (i) objections concerning the accounting must be brought to the court’s attention by an interested person because the court does not normally review the accounting without an objection; (ii) interested persons have a right to review proofs of income and disbursements at a time reasonably convenient to the personal representative and the interested person; (iii) interested persons may object to all or part of an accounting by filing an objection with the court before allowance of the accounting; and (iv) if an objection is filed and not otherwise resolved, the court will hear and determine the objection.” MCR 5.310(C)(2); MCL 700.5417

In addition, the law allows interested persons to examine the documentation the conservator is required to have regarding income and disbursements: “(d) Proof of Income and Disbursements. After filing and before the allowance of an accounting, the personal representative must make proofs of income and disbursements reasonably available for examination by any interested person who requests to see them or as required by the court.” MCR 5.310(C)(2)

Therefore, interested parties have both notice and opportunity -- and responsibility -- to bring any accounting discrepancies or problems to the court’s attention. Some courts utilize a guardian ad litem (GAL) on a regular basis to help ensure that the account is appropriate. A GAL, however, represents an added expense for the protected individual because the estate pays the GAL’s fees.

As to the frequency of review, MCR 5.409(C)(6), which was adopted to implement EPIC, states: “Unless accounts have been allowed, the court shall review the accounts no less often than once every three years.” The comment to this section states: “The scope of the review is not defined, so as to allow the court flexibility in choosing among methods such as staff review, appointment of a guardian ad litem and other methods which may be appropriate for specific files. However, minimum levels of review should be consistent with standards to be set by the State Court Administrator.” This requirement was added to the court rules effective January 1, 2002.

On July 19, 2002, SCAO issued Administrative Memorandum 2002-08, which provides guidelines for reviewing fiduciary accounts. SCAO will update these guidelines and continue to make them available on the Michigan Supreme Court web site. Briefly, the guidelines follow state law by requiring that a petition for allowance of the account is accompanied by either 1) proof of service showing all interested parties were properly noticed, or 2) waivers and consents from all interested parties. The court is instructed to check that 1) the accounting period is accurate and does not exceed 12 months; 2) the income and expenses are appropriate and are appropriately calculated; 3) an adequate written description of fiduciary services for which fees are being taken is attached and that those fees are reasonable; and 4) the fiduciary has signed and dated the account.

Specific Case File Comments:

The performance audit identified 23 cases in which the assigned Guardian Ad Litem review of the conservators’ records did not discover or disclose instances in which the annual accountings contained deficiencies significant enough to recommend that the court not approve the annual accounting.

SCAO reviewed the court files and the Guardian Ad Litem reports filed with the court for those annual accountings. In some instances, the accountings were deficient, but in many cases the information in the file provided an explanation for the alleged deficiency. In other cases, the court file did not reveal the deficiency detected by the OAG.

FINDING

2. Accounting for Financial Activities and Assets

Audit Condition:

“Probate courts did not adequately inform and train conservators in their duties and responsibilities to properly account for and report estate assets and financial activities in the annual accountings submitted to the courts. The SCAO needs to provide sufficient direction and guidance to probate courts to help ensure that conservators are properly informed of their duties and responsibilities.”

General Comment:

Although the law does not require training of conservators, training would be helpful to both conservators and the courts. In many cases, the conservator is a family member of the ward, rather than an attorney or other professional. As a result, many conservators do not completely understand their roles. SCAO is committed to addressing this issue once it has identified all of the problem areas.

SCAO is conducting a statewide review of conservatorship cases. Once this process is completed, it will develop training materials for the courts and conservators to help conservators understand their duties.

Currently, the Letters of Conservatorship that are issued to every conservator have printed on the back of the form “NOTICE TO CONSERVATOR OF CERTAIN DUTIES.” This notice details the reporting requirements for conservators. Included in this notice are references to statutory provisions that set forth a conservator’s responsibilities. This notice further states, “[t]he court is prohibited by statute from giving you legal advice.” Because there is sometimes a fine line between what is legal advice and what is simply procedure, court personnel are reluctant to instruct conservators as to their duties. Some courts, however, have compiled packets of information that include all the conservator’s duties, along with instructions for completing the inventory and account. SCAO is collecting these information packets, which will be used to develop materials that can be distributed to conservators statewide.

Specific Case File Comments:

The performance audit noted 37 cases in which the conservators did not properly account for either the estate assets or the financial activities occurring in the annual accounting period.

SCAO's review of the 37 court files determined the following regarding these deficiencies:

- In seven of the cases, the deficiencies were substantiated in the court file and the annual accountings.
- In six of the cases, the cited deficiencies were improperly prepared accountings where all assets and expenses were accounted for. These accountings revealed a need for conservator training.
- In eight of the cases, the deficiencies were not specifically reviewed because the performance audit determined that the assets were included in the bank accounts of the estates. In these cases, the deficiencies demonstrated a need for conservator training.
- In six of the cases, the deficiencies were subsequently resolved in additional court filings, such as decedent estate files, and other documents not available at the time of the performance audit.
- In 10 of the cases, SCAO's review of the case file did not substantiate the deficiency found by the OAG, indicating that the OAG's noted deficiency was with the conservator's procedure, rather than with the probate courts' procedure.

FINDING

3. Documentation of Estate Assets and Activities

Audit Condition:

“Probate courts did not ensure that conservators maintained sufficient documentation to support items reported in annual accountings and did not perform investigations when discrepancies were identified in annual accountings. The SCAO needs to provide probate courts with specific direction and guidance regarding the level of documentation needed to support items reported in annual accountings and to perform investigations when discrepancies are identified in annual accountings.”

General Comment:

The audit finding referenced MCL 700.5417(2), which states, “*the conservator must keep suitable records of the administration and exhibit those records on the request of an interested person.*” As previously noted in SCAO comment to Audit Finding 1, the conservator is not required to provide documentation of all income and expenses to the court, but the conservator is required to keep documentation for review by interested parties upon request. There is also no requirement that a court review documentation to verify amounts on accounts. In fact, the notice contained on the Account of Fiduciary is as follows:

NOTICE TO INTERESTED PERSONS

1. You must bring to the court’s attention any objection you have to this account. The court will not review the account otherwise.
2. You have the right to review proofs of income and disbursements at a time reasonably convenient to the fiduciary and yourself.
3. You may object to all or part of the accounting by filing a written objection with the court before the court allows the account. You must pay a \$20.00 filing fee to the court when you file the objection. (See MCR 5.310(C))
4. If an objection is filed and is not otherwise resolved, the court will conduct a hearing on the objection.
5. You must serve the objection on the fiduciary or his/her attorney.

A court should take steps to ensure that deficiencies brought to its attention are resolved properly. SCAO’s review of the files identified under this finding revealed that the courts were aware of some of the problems that the performance audit disclosed. SCAO did identify some areas where a court should take a more active role, such as ensuring that borrowed conservatorship funds are repaid as agreed.

Specific Case File Comments:

The performance audit reported that 47 cases did not contain sufficient documentation to support items on the annual accountings. SCAO’s review of court files for the cases determined the following regarding this deficiency:

- In ten cases, there was a deficiency substantiated in the court file and the annual accountings. Some of these deficiencies were that borrowed funds were not being repaid as agreed.
- In seven of the cases, the cited deficiencies were improperly prepared accountings where all assets and expenses were accounted for. These accountings revealed a need for conservator training.
- In 30 of the cases, SCAO's review of the case file did not substantiate the deficiency found by the OAG, indicating that the OAG's noted deficiency was with the conservator's procedure, rather than with the probate courts' procedure.

The performance audit also reported that 10 cases did not contain sufficient documentation to support the reported value of assets listed on the annual accounting. SCAO's review of the court files for the 10 cases determined the following regarding this deficiency:

- In three of the cases, the deficiency was substantiated in the court file and the annual accountings.
- In two of the cases, the deficiency was resolved to SCAO's satisfaction based on additional information not available during the performance audit.
- In five of the cases, SCAO's review of the case file did not substantiate the deficiency found by the OAG, indicating that the OAG's noted deficiency was with the conservator's procedure, rather than with the probate courts' procedure.

FINDING

4. Administration and Monitoring

Audit Condition:

“Three probate courts did not have effective controls to ensure that conservatorship cases were appropriately administered and monitored. The SCAO needs to provide probate courts with specific direction and guidance to appropriately administer and monitor conservatorship cases.”

General Comment:

SCAO does “provide probate courts with specific direction and guidance to appropriately administer and monitor conservatorship cases.” SCAO's review of the five audited probate

courts indicated that where the court followed court rules and statutes, the court's procedures were effective.

Specific Case File Comments:

The performance audit reported that, in 21 minor conservatorship cases, the conservator information was outdated, and the performance audit could not determine the disposition of the estate. SCAO's review of the court files noted that these minors' funds were required to be placed in restricted accounts. Under Michigan law, unless the conservator petitioned the court for a withdrawal of funds, there was no need for contact between the conservator and the court until the minor reached the age of majority. When the minor reaches the age of majority, the minor contacts the court to obtain release of his or her funds.

With respect to the annual accounting requirement, MCR 5.409(C)(4) provides: "Conservatorship of Minor. Unless otherwise ordered by the court, no accounting is required in a minor conservatorship where the assets are restricted or in a conservatorship where no assets have been received by the conservator."

Michigan law also requires conservators to report any change of address. The Notice to Conservator of Certain Duties, which is printed on the back of the Letters of Conservatorship, states: "CHANGE OF ADDRESS: You are required to inform the court of any change in the ward's address within 14 days of the change. You are also required to keep the court and interested persons informed in writing within 7 days of any change in your address." Conservators do not always comply with this requirement, however. This is an issue that should be addressed through training of conservators.

The performance audit reported 63 cases in which the courts suspended conservators who did not file annual accountings, and where the courts did not then appoint a special fiduciary to ensure the estate assets were safeguarded. SCAO's review determined that the Michigan Compiled Laws do not require the appointment of a special fiduciary automatically upon the suspension of a conservator. SCAO noted the following for 59 of the 63 cases:

- Twenty-one of the conservators were not suspended. The conservators did receive Notices of Deficiency for late reporting. In some of these instances, the conservator was removed and a

successor conservator was put in place, but there was no period of time where the ward's assets were left unprotected.

- Four of the conservators were suspended; the court has received final accounts and closed the files.
- Seven of the conservators were suspended; the court and SCAO are following up to determine the condition of the estate.
- Three of the conservators were suspended for failure to file annual accounts and then reinstated either by filing the delinquent accounts or with specific orders to file accounts.
- Five of the conservators were suspended; the cases were closed as the wards involved in the cases reached the age of majority or are deceased.
- Seven of the conservators were suspended; the cases were closed. The court received evidence from the ward that all funds were received in each of these files.
- One conservator was suspended. SCAO and the court were able to verify, however, that the funds in the estate remained intact.
- One conservator was suspended; a special fiduciary was appointed to report to the court on the status of the estate assets.
- One conservator was suspended for failure to file accounts; the court has appointed a successor conservator.
- Five conservators were suspended for failure to file accounts. The court has ordered immediate repayment of either borrowed or unapproved withdrawals from the conservatorship accounts by the conservator, bank, or both, and the court has appointed a successor conservator. Where the bank erroneously released funds that were in a restricted account without a court order, the bank replaced the funds. The bank has the option to pursue collection from the conservator.

Also, the performance audit reported 18 cases in which the annual accountings contained items that should have prompted the courts to take action to ensure that the protected individuals' assets were safeguarded. SCAO reviewed 16 of the 18 cases. One case was not reviewed because the performance audit determined that the assets were intact. SCAO noted the following:

- In one case, the deficiency was subsequently resolved in additional filings in the case and other documents not available at the time of the performance audit.

- In eight of the cases, the deficiencies were substantiated in the court file and the annual accountings. At hearings held in each case subsequent to the audit, the court appointed a successor conservator and ordered the prior conservator to repay borrowed funds with interest plus successor conservator fees within 14 days. Each conservator has been ordered to reappear to prove payment had been made. SCAO and the court are closely monitoring these files for compliance.
- In seven of the cases, SCAO did not find the deficiency reported by the OAG.

FINDING

5. Compliance With Laws

Audit Condition:

“Probate courts were not consistent in their enforcement of conservator reporting requirements of the Michigan Compiled Laws and the Michigan Court Rules. As a result, many conservators did not file inventories, annual accountings, and final accountings within the required time frames.”

General Comment:

Probate courts are responsible for enforcing the conservator reporting requirements of the Michigan Compiled Laws and the Michigan Court Rules, including timing requirements. SCAO will emphasize that courts are expected to take corrective action when a conservator fails to comply.

Currently, SCAO requires each court to submit a Delinquent Fiduciary Report biannually. This report provides the delinquent status of fiduciaries and prompts the court to follow up with the fiduciary. The court is required to make notations on the report to indicate what action has been taken to correct the delinquency.

Specific Case File Comments:

The performance audit reported 113 cases in one court in which the required reporting was delinquent. SCAO’s review of these cases indicated that in the majority of the cases the court had initiated some type of action subsequent to the performance audit. In 26 cases, the conservatorship estate administration had been completed, the conservator had been discharged,

and the case had been closed. Fourteen cases had been administratively closed; however, the conservator was not discharged because of failure to finalize administration. Accounts had been filed in 28 cases. Seven cases had received an annual accounting since the performance audit, but were again delinquent in their reporting. The remaining cases were still delinquent with follow-up action being taken by the court. The court is in the process of scheduling show cause hearings for all delinquent fiduciaries to bring their accounts current. SCAO is following up with the court on these cases.

The performance audit also reported 25 cases in a second court in which the required reporting was delinquent and another four cases in which a required accounting was not filed. SCAO's review of the 25 files in this court indicated that the court was independently aware of the delinquent status of fiduciaries and was taking appropriate steps to bring them into compliance. SCAO's review of the four additional cases noted that the estate funds were either in a restricted account where access was denied without court order, or the only income was social security that was going directly to the nursing home where the ward resided.

FINDING

6. Data Collection

Audit Condition:

“The probate court data systems need to be expanded to capture additional information to improve conservator monitoring. Also, the SCAO needs to review the feasibility of providing probate courts with additional analytical reports with which to evaluate conservators.”

General Comment:

In order to effectively monitor conservatorship cases, the courts need reports that capture appropriate data. As noted in Finding 5, all courts prepare biannual delinquent fiduciary reports. These reports list all delinquent fiduciaries, why they are delinquent, and how long they have been delinquent. It provides an opportunity for each court to review its delinquent fiduciaries and ensure that appropriate steps have been taken to bring the fiduciary into compliance with court rules and statutes. Once the statewide review of conservatorship cases is completed,

SCAO will be in a better position to determine what other information will provide useful monitoring of conservatorship cases.

Specific Case File and Report Comments:

The performance audit reported one case in which the fees for an estate appeared excessive. SCAO's review of this case determined that the finding by the OAG is correct. This conservator was an attorney. There was an itemized statement for his services attached to each annual account. The attorney charged at both a conservator rate and an attorney rate depending on the service provided. The fees charged were excessive for the size of this estate. Since this was a minor conservatorship, this ward would have been better served by the court placing these funds in a restricted account, eliminating the need for an annual account. An additional problem with this file is that there was no willing or able family member to serve as conservator. While SCAO's review did not disclose any ethical violation by the attorney, SCAO will follow up with the court about reporting requirements placed on the attorney.

The performance audit recommended four examples of further information that could be useful to courts in performing review and analysis of case file data necessary to focus the probate courts' monitoring efforts. The following is SCAO's analysis of these examples:

- The performance audit recommended tracking the number of adults and the number of minors who have conservatorships, guardianships, or both. SCAO determined that while the adult and minor conservatorships were not separately reported during the performance audit, since 2002 they have been identified separately in yearly statistical reports. This information is available on the Supreme Court's website.
- The performance audit recommended tracking the number of cases managed and fees assessed by professional conservators, including attorneys, banks, and companies. This would be useful information, but its usefulness would be limited. There are many variables that determine the fee charged by a fiduciary other than the size of the estate. Cases that tend to be problematic will necessitate a higher fee. Additionally, some cases have feuding family members or interested parties that create a considerable amount of work for both the guardian and conservator, thereby increasing fees. If the fiduciary is also an attorney, situations that necessitate court involvement increase the fees. If the fiduciary is not an attorney, the fiduciary may be forced to hire one; the estate pays the attorney fees.

- The performance audit recommended that the courts track the number of times judges appoint a specific GAL, counsel, review attorney, and professional conservator. This information would be useful; SCAO will develop analytical reports to help track the frequency with which specific individuals are appointed.
- The performance audit recommended tracking the number of annual petitions filed for conservatorship and the number of petitions granted. SCAO determined that while the number of petitions filed and granted was not reported during the performance audit, the information has been identified in yearly statistical reports since 2002. This information is available on the Supreme Court’s website.

FINDING

7. Open Caseloads

Audit Condition:

“Probate courts need to close conservatorship cases when protected individuals die or reach the age of majority and to monitor the status of inactive cases and close them as appropriate.”

General Comment:

Courts should appropriately monitor their caseloads and close cases as appropriate. Doing so will help to ensure accurate data regarding pending caseloads, which in turn will allow the court to appropriately allocate resources and staff. However, the weighted caseload formula on which judicial resource recommendations are based uses new case filings. Pending caseload is examined as part of the extended analysis, and is not the only determining factor in making recommendations for judgeships.

Specific Case File Comments:

The performance audit reported 35 cases in one court that remained open when the file should have been closed for reasons such as the protected individual reached the age of majority, the protected individual died, the conservator had been suspended and no activity had taken place in over four years, the conservatorship was terminated, or the reason for the conservatorship was not realized. SCAO received documentation from the court that all of the cases have now been closed.

The performance audit reported an additional 782 cases in this court in which minors had reached the age of majority, and 178 cases in which the protected individuals were deceased. SCAO received documentation from the court that the cases had either been closed or that a small number of the cases remained open because of pending issues. The court identified delinquent files before learning about the OAG's concerns, which resulted in about 80% of these files being closed. The court worked with SCAO to implement a system for closing delinquent files and is continuing the SCAO-approved practice of administratively closing cases where it is appropriate.

The performance audit reported 78 cases in another court where no activity had occurred in over two years. The performance audit found that the court generally did not suspend a conservator until after the conservator failed to file three annual accountings. Also, the court had not appointed special fiduciaries to ensure the estate assets were not wasted or dissipated. These conditions may have explained why some inactive cases remained open. At the time of the performance audit, the court's probate register was in the process of reviewing and attempting to close some of the old case files.

SCAO determined that it was apparent from its review of files in this court that the probate register was in the process of reviewing all of the conservatorship files to determine what action the court should take. Open cases have been closed, and closed cases have been reopened where further action is required. The court and SCAO are actively monitoring these files.

FINDING

8. Management of Estate Assets

Audit Condition:

“Four probate courts did not ensure that conservators effectively managed estate assets and complied with the Michigan Compiled Laws. The SCAO needs to provide sufficient direction and guidance to probate courts to ensure effective management of estate assets in compliance with the Michigan Compiled Laws.”

SCAO General Comment:

It is the probate courts' role to determine whether conservators are complying with the Michigan Compiled Laws regarding estate asset management. Conservators are required to manage conservatorship assets according to the Michigan prudent investor rule.

The Michigan prudent investor rule was enacted with EPIC, which became effective April 1, 2000 (the files identified under this finding by the OAG were all opened between 1981 and 2000). Before EPIC went into effect, a conservator was charged with handling estate assets as a "prudent man dealing with property of another." RPC 700.813. "Prudent" is defined as exercising good judgment or common sense.

The Michigan prudent investor rule further defined the conservator's role with regard to estate assets. The prudent investor rule (MCL 700.1502) provides: "(1) A fiduciary shall invest and manage assets held in a fiduciary capacity as a prudent investor would, taking into account the purposes, terms, distribution requirements expressed in the governing instrument, and other circumstances of the fiduciary estate. To satisfy this standard, the fiduciary must exercise reasonable care, skill, and caution. (2) The Michigan prudent investor rule is a default rule that may be expanded, restricted, eliminated, or otherwise altered by the provisions of the governing instrument. A fiduciary is not liable to a beneficiary to the extent that the fiduciary acted in reasonable reliance on the provisions of the governing instrument."

MCL 700.1503 provides further clarification: "(1) A fiduciary's investment and management decisions with respect to individual assets shall be evaluated not in isolation, but rather in the context of the fiduciary estate portfolio as a whole and as a part of an overall investment strategy having risk and return objectives reasonably suited to the fiduciary estate. (2) Among circumstances that a fiduciary must consider in investing and managing fiduciary assets are all of the following that are relevant to the fiduciary estate or its beneficiaries: (a) General economic conditions. (b) The possible effect of inflation or deflation. (c) The expected tax consequences of an investment decision or strategy. (d) The role that each investment or course of action plays within the overall portfolio, which may include financial assets, interests in closely-held enterprises, tangible and intangible personal property, and real property. (e) The expected total return from income and the appreciation of capital. (f) Other resources of the beneficiaries. (g)

The need for liquidity, regularity of income, and preservation or appreciation of capital. (h) An asset's special relationship or special value, if any, to the purposes of the fiduciary estate or to 1 or more of the beneficiaries. . . . (4) . . . A particular investment is not inherently prudent or imprudent.”

MCL 700.1509 provides: “Compliance with the prudent investor rule is determined in light of the facts and circumstances that exist at the time of the fiduciary’s decision or action, and not by hindsight. The prudent investor rule requires a standard of conduct, not outcome or performance.”

In applying the prudent investor rule to the role of conservator, MCL 700.5423 provides: “(2) Acting reasonably in an effort to accomplish the purpose of the appointment and without court authorization or confirmation, a conservator may do any of the following: (e) invest or reinvest estate property. . . . in accordance with the Michigan prudent investor rule. (f) Deposit estate money in a state or federally insured financial institution including one operated by the conservator.”

Specific Case File Comments:

The performance audit reported seven cases in which the conservator was not timely in paying estate bills. SCAO reviewed five of the seven cases and noted the following:

- In four of the cases, the deficiency was substantiated in the court file and the annual accountings.
- In one case, the bills were paid late because the conservator was unable to gain immediate control of the assets. Once the conservator received the assets, the bills were paid on time.

The performance audit reported that in two cases, and for one conservator managing 62 cases, the assets of the estate of the protected individuals were not actively managed. SCAO’s review of the cases disclosed the following:

- In two of the cases, SCAO's review of the case file did not substantiate the deficiency found by the OAG, indicating that the OAG's noted deficiency was with the conservator's procedure, rather than with the probate courts’ procedure.

- The conservator with 62 cases held all protected individuals' funds in a non-interest bearing trust account having an average daily balance of over \$425,000. This conservator has a total of 225 individuals for whom she receives money in her role as the public administrator. She is the representative payee for social security benefits for several individuals. These individuals receive a monthly check that is deposited into this account. She is guardian for several individuals who do not have sufficient funds for a conservatorship, but they also receive minimal monthly income that is deposited into this account. All money in this account is paid out monthly for the care of the wards. Since this audit, this administrator has opened separate savings accounts for all of the conservatorships. These savings accounts earn interest in compliance with Michigan law. All individuals that have assets have separate checking accounts. Many of these individuals receive Medicaid.
- One conservator was identified as selling property below market value on 11 of 16 properties. A review of all of these files showed that different realtors were used to sell the properties to different individuals. All sales were by petition with court approval and notice to all interested parties. It should be noted that this conservator was not automatically liquidating properties. She was not paid for her services out of estate assets. She is the public administrator and is paid by the county. Many of these files involved circumstances where there was no one else to handle these individuals' affairs. Our review to this point indicates that there was not enough money to clean or repair these properties before sale.

The performance audit reported 10 cases in which the conservator did not ensure that all protected individuals' assets were properly taken into the custody of the estate and safeguarded. Also, the performance audit reported that five of the 10 cases were for minor protected individuals for which the conservator did not put the funds of the estate into restricted accounts as ordered by the court. SCAO's review of these cases noted the following:

- In five of the cases, the deficiencies were substantiated in the court file and the annual accountings. SCAO and the court are conducting further investigation into these cases.
- In three of the cases, SCAO's review of the case file did not substantiate the deficiency found by the OAG, indicating that the OAG's noted deficiency was with the conservator's procedure, rather than with the probate courts' procedure.
- In two of the cases, the deficiencies were subsequently resolved in other documents not available at the time of the performance audit.

FINDING

9. Disbursement of Estate Funds

Audit Condition:

“Two probate courts did not ensure that conservators expended estate money exclusively for the support, education, care, and benefit of the protected individuals they represented in compliance with the Michigan Compiled Laws. The SCAO needs to provide sufficient direction and guidance to probate courts to ensure that conservators expend estate money exclusively for the support, education, care, and benefit of the protected individuals they represent.”

General Comment:

A conservator should expend estate funds for the support, education, care, and benefit of the protected individual in compliance with the Michigan Compiled Laws. However, MCL 700.5425(c) states: “The conservator may expend estate money for the support of an individual legally dependent on the protected individual and others who are members of the protected individual’s household who are unable to support themselves and who are in need of support.” Therefore, it is also acceptable in certain circumstances for a protected individual’s assets to be used for the benefit of others. But it would be unacceptable to use a protected individual’s assets for the benefit of others as allowed by MCL 700.5425(c), where this use would result in insufficient funds to provide the necessary support, education, care, and benefit to the protected individual.

Specific Case File Comments:

The performance audit reported five cases where estate money was expended for items beyond what was necessary for the support, education, care, and benefit of the protected individuals represented. SCAO’s review of these cases determined the following:

- In three of the cases, the deficiencies were substantiated in the court file and annual accountings. The court and SCAO are closely monitoring these files to ensure compliance with Michigan laws.
- In two of the cases, the court allowed the use of conservatorship funds to support family members. In one case, it was at the recommendation of medical care providers and guardian

ad litem. In the other case, the conservatorship funds replaced the income of the injured father/husband.

FINDING

10. Self-Dealing

Audit Condition:

“Probate court administrative controls in three counties did not prevent conservators from engaging in self-dealing. The SCAO needs to provide sufficient direction and guidance to probate courts related to preventing self-dealing by conservators.”

General Comment:

Probate courts must respond appropriately to allegations that conservators are engaging in self-dealing. Under Michigan law, a conservator may request authorization from the court to engage in an activity that would qualify as self-dealing. But the conservator must first provide proper notice to all interested parties, allowing them an opportunity to object. The court will then consider the request, weighing any indirect benefit to the protected individual. The transaction may not be entered into without an order from the court.

Specifically, MCL 700.1214 states: “Unless the governing instrument expressly authorized such a transaction or investment, **unless authorized by the court**, or as provided in section 4405 of the banking code of 1999, 1999 PA 276, MCL 487.14405, a fiduciary in the fiduciary’s personal capacity shall not engage in a transaction with the estate that the fiduciary represents and shall not invest estate money in a company, corporation, or association with which the fiduciary is affiliated, other than as a bondholder or minority stockholder. A fiduciary in the fiduciary’s personal capacity shall not personally derive a profit from the purchase, sale, or transfer of the estate’s property.” (Emphasis added)

MCL 700.3713 further states: “A sale or encumbrance to the personal representative, the personal representative’s spouse, agent, or attorney, or a corporation or trust in which the personal representative has a substantial beneficial interest, or a transaction that is affected by a substantial conflict of interest on the part of the personal representative, is voidable by an interested person except a person who consents after fair disclosure, unless any of the following

are true: (a) The will or a contract entered into by the decedent expressly authorized the transaction. (b) **The transaction is approved by the court after notice to interested persons.** (c) The transaction is otherwise permitted by statute.” (Emphasis added)

The transactions allowed by the court almost always involve a family member. There are instances, however, where the conservator engages in the self-dealing transaction before requesting court approval. Often, the court will then order the conservator to enter into a formal agreement to repay the misappropriated funds.

In some instances, the conservator does not understand his or her role as conservator; this issue should be addressed in training materials for conservators. In addition, this is an area that will be addressed in the materials that will be developed to aid the courts in reviewing annual accounts.

Specific Case File Comments:

The performance audit reported 15 conservators who borrowed money from the estates that they represented. Of the 15 loans, there were seven repayment agreements in place. Of the seven repayment agreements, only four of the conservators were making payments on the loans.

SCAO’s review of the 15 cases determined the following:

- In six of the cases, the court approved the loans. Payments were being made in only one of these cases. SCAO and the court are following up with these conservators to ensure repayment.
- In five of the cases, the court had not approved the loans. In two of the cases, the amount had been fully repaid. The three remaining cases have been referred to the prosecutor.
- In one of the cases, the amount taken from the estate was actually a court-approved withdrawal to purchase items for the minor ward rather than a loan.
- In one of the cases, there was no evidence of a loan from conservatorship funds. The ward had petitioned for the conservatorship to help her repay loans she had previously taken.
- In two of the cases, the court approved some of the withdrawals as loans, but the conservator took additional unapproved funds. In both of these cases, the court has ordered the conservator to repay the funds with interest immediately. Successor conservators have been appointed with the conservator to pay part of the successor conservator fees. Both

conservators have been ordered to appear in court to show that they have repaid the approved and unapproved borrowed funds. Since these funds were taken against court order, both conservators have been referred to the local prosecutor.

The performance audit also reported that one conservator paid its own “chore service” business to perform chore and grocery shopping services for the estate the conservator represented. SCAO determined that this conservator was paying its own chore service to perform services for the ward. When the court intervened, the conservator did stop using its own chore service.